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In the Supreme Court of the United States

OCTOBER TERM, 1957

CHARLES PADRON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1958. The petition for a writ of certiorari was filed on May 29, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred, after granting petitioner's motion for a severance of his jury trial from that of a co-defendant, in trying the co-defendant with petitioner after the co-defendant had waived her right to a jury trial and consented to be tried by the trial court.

STATEMENT

In March 1957, in the United States District Court for the Southern District of Texas, petitioner was found guilty on four counts charging him and others with conspiracy to smuggle marihuana into the United States and substantive violations of the laws relating to marihuana. He was sentenced to imprisonment for ten years—five on the conspiracy count and five years concurrent on the substantive counts (R. 4-10, 38-40). On appeal, the conviction was affirmed.

Four persons were named as defendants in the indictment. Petitioner stood trial with one Emilio Chavez. The government severed as to another co-defendant, Mills Ortiz, who pleaded guilty. As to the fourth defendant, Gloria Chavez,[1] petitioner moved for severance on the grounds that there were conflicts of interests between Gloria and petitioner, that she intended to be a government witness under the guise of her plea of not guilty, and that there was animosity between her and her husband, Emilio Chavez, who was being tried with petitioner (R. 10-17). On March 11, 1957, at the opening of trial, after the jury had been impaneled and excused, the trial court stated that it was granting the motion to sever "at least at this time"

[1] Gloria Chavez is also referred to in the record as Maria Esther Garcia Rodriguez (R. 10).

(R. 50). It also noted, in the presence of all parties, that (R. 50):

> Counsel for the defendant Rodriguez [the same person as Gloria Chavez] has indicated that she desires to waive a jury trial. Counsel for the government has not yet waived. If they care to do so, they may, and I will carry the case along against her if they do it.

The court at that time ruled that, if Gloria was to be used as a witness, any confession made by her should be made available to petitioner and his co-defendant (R. 51).

The actual trial began on the afternoon of March 11. The court ruled that most of the witnesses were to be excluded from the court room until called. When counsel for Emilio Chavez suggested that Gloria should be made subject to the rule, the court said (R. 53):

> No counsel, I will not put her under the rule for reasons I will be glad to state later. I am not putting her under the rule. I will explain to you later.

The next day, March 12, 1957, after Ortiz had testified (see *infra*) and before Gloria Chavez took the stand, the petitioner moved for a mistrial on the ground that the participation of Gloria Chavez' counsel prejudiced the petitioner (R. 227, 228). The court overruled the motion. It noted that, in granting the motion to sever, it had announced that Gloria wished to waive jury trial. Subsequently at 1:45 on the afternoon of March 11, counsel for the government, in petitioner's absence, had announced that the government was willing to waive the jury and a written waiver had been signed in open court. The court stated that (as it had

previously announced (R. 50)) it would carry the case along with petitioner's case (R. 227). However, it also ruled that it would not permit Gloria's confession or statement to be introduced in evidence against her before the jury; that if "the Government wishes to introduce it after this jury trial is concluded, and I will carry what I can of this case along with me as against Maria, or Gloria" (R. 228). The court noted that it did not know what was planned as to whether Gloria would take the stand as a witness for the government; that this was a decision for her and her attorney. It noted that it did not believe that any harm had or could come to petitioner from participation of Gloria's counsel (R. 228).

The government's evidence showed that on April 12, 1956, co-defendant Mills Ortiz was driving an automobile from Nuevo Laredo, Mexico, to Laredo, Texas. An inspection of the automobile revealed several packages of marihuana in blue cotton bags covered with a plastic bag. Ortiz tried to escape when the marihuana was found, but was apprehended (R. 54-60, 62, 336-340).

Ortiz, who was 21 years old, testified that he met petitioner in Chicago and later sewed some seat covers for petitioner's car; that petitioner offered him a place to live when he had no money; and that later petitioner asked him whether he wanted to drive to Mexico and bring back marihuana (R. 85, 91, 93-95). Ortiz, Chavez and petitioner inspected a 1951 Buick which petitioner paid for in cash (R. 94-95; see also R. 268-272). Ortiz drove the Buick to Mexico and Chavez and his wife drove to Mexico City in a 1953 Studebaker (R. 96-98). In Mexico, Ortiz had trouble with his car and made a telephone call to petitioner in the presence of Chavez

who also spoke (R. 99, 101). Subsequently, money was wired to Chavez who turned it over to Ortiz (R. 102-104). Ortiz and Chavez went to a ranch where Chavez purchased marihuana. It was packed into cloth and plastic bags which were then placed inside the fender walls and underneath the car (R. 105-109). Chavez and his wife crossed the border in their Studebaker, but Ortiz was apprehended (R. 111-113).

On cross-examination by counsel for Emilio Chavez, Ortiz testified that Chavez told him that he and Gloria had been married and divorced. He also testified that they stayed at the same hotel. Counsel for Gloria objected to this testimony (R. 208-209).

Gloria testified that she married Chavez in 1951, was divorced and separated from him in 1955. In March 1956, he asked her if she wanted to go to Mexico with him to see their children who were with his mother (R. 234-236).[2] She testified that on the way down the Buick followed the Studebaker (R. 241-242) and that it accompanied them back from Mexico City to Nuevo Laredo (R. 244-245). On the way back, Emilio told her that there was marihuana in the Studebaker (R. 248).

On cross-examination, petitioner's counsel asked her whether she had not held herself out as the wife of Chavez on the trip and she admitted that she had (R. 253-256). When Emilio's counsel cross-examined along the same lines, Gloria's counsel objected and the court overruled the objection (R. 258-260). Emilio's counsel also asked if she had not reported Emilio to the immigration authorities (R. 261). Gloria's counsel

[2] When counsel for Chavez raised a question as to the divorce, Gloria's counsel said that he had the papers at his office and asked for permission to bring them in "for the protection of our client's veracity" on this point (R. 238).

entered an objection to this line of questioning saying that in that region it was considered a bad offense to report a person to the immigration authorities (R. 262). Counsel for Emilio asked whether Gloria's counsel was acting "as defense attorney, or prosecuting attorney" and the court replied that "He is acting as defense counsel for this woman who is on trial here before the Court" (R. 262). The court instructed the jury not to take into consideration the objection by Gloria's counsel (R. 263).

In its instruction to the jury, the court noted that there were only two defendants on trial before the jury, petitioner and Emilio Chavez (R. 575).

ARGUMENT

The trial court's decision to consider the evidence adduced at the trial in determining the guilt of Gloria Chavez, who had waived a jury trial, was not, as petitioner declares, a secret understanding. The court announced in the presence of petitioner's counsel, when it granted the motion for a severance, that, if the government consented to a waiver of jury trial it would "carry the case along against her." Before evidence was taken, it announced that there were reasons for not excluding Gloria from the court room, and it gave the explanation of its actions before Gloria took the stand. (See the Statement, *supra*.)

As the trial court ruled, and the Court of Appeals affirmed, there is nothing in the record which supports petitioner's contention that this action by the trial court prejudiced him. The trial judge, in effect, decided that, since he was to rule in Gloria's case, there was no necessity for him to hear the evidence twice, once as it would be presented to the jury against peti-

tioner and Emilio, and again as it would be presented without a jury against Gloria. The judge was careful, however, to make certain that any statement by Gloria would not be allowed before the jury and no attempt by the government was made to introduce it. The only reference to Gloria's statement was made by petitioner's counsel in cross-examining her (R. 254-255).

The possibility that Gloria would choose to testify for the government was known to petitioner at the time he made his motion to sever and was one of the bases for his motion. The judges's ruling to try Gloria at the same time that petitioner was on trial before the jury was made without regard to her decision in this respect (R. 228). The fact that she chose to testify for the government is thus something apart from the ruling of the judge on the consideration of her case.

Moreover, Gloria's testimony did not implicate petitioner with whom she had no dealings. Her testimony did serve to corroborate the testimony of Ortiz as to the trip to Mexico and the return. But the testimony of Ortiz which implicated petitioner, as to the purchase of the car and the sending of money for repairs, involved matters as to which Gloria could not testify. The corroboration of this testimony came from a salesman as to the sale of the car (R. 268-272), and from petitioner himself. Petitioner, when he took the stand, admitted negotiating for the purchase of the car, although he said it was bought for Ortiz with Ortiz' money because Ortiz had difficulty with English (R 443-444). He also admitted wiring money to Mexico but explained that as the payment of money due Chavez for carpentry work (R. 445-446). The fact that the

jury did not believe this explanation cannot be attributed to Gloria's testimony.

The participation of Gloria's counsel at the trial was minor. Counsel made five objections, twice asked for conferences at the bench, made a motion for acquittal outside the presence of the jury and assisted the interpreter on a few occasions (R. 87, 115, 145, 208, 229, 238, 258, 259, 262, 326, 349, 351, 377, 378, 379, 434, 451). None of the things which petitioner relied upon as a basis for his motion to sever (conflicts of interests, personal animosities) were brought out by Gloria Chavez' counsel.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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